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VIA E-MAIL

Ms. Morgan L. Ratner
Assistant to the Solicitor General
U.S. Department of Justice
950 Pennsylvania Avenue N.W.
Washington, D.C. 20530

Re: *Envt'l Protection Comm'n of Hillsborough Cty.* v. *Volkswagen Grp. of Am.*, Case No. 18-15937 (9th Cir.)

Dear Morgan:

We represent the Counties in this case, and we appreciate the opportunity to meet with you to discuss the Ninth Circuit's invitation. The Counties' claims arise from Volkswagen's efforts to bypass motor vehicles' emissions-control systems in violation of state, local, and federal anti-tampering rules. This letter brief addresses what we see as the core issue facing the Ninth Circuit: whether the district court erred in holding that the Counties' "recall tampering" claims (based on new software installed post-sale on in-use vehicles) pose an obstacle to Congress's objectives in the Clean Air Act. For the reasons explained below, the court did err, and the Ninth Circuit should vacate and remand.

A. Statutory And Factual Background

1. The Clean Air Act imposes a variety of standards and requirements "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. 7401(b)(1). At the same time, however, Congress recognized that preventing and controlling pollution remains "the primary responsibility of States and local governments." 42 U.S.C. 7401(a)(3). The Act's substantive provisions reflect that balancing act.

Two groups of provisions are primarily relevant here—the Act's preemption (and savings) provisions and the Act's regulation of tampering.

Preemption. The Act imposes emissions standards for new motor vehicles. See 42 U.S.C. 7521. To prevent "an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for the manufacturers," Congress added an express

preemption provision. *Motor & Equipment Mfrs. Ass'n, Inc.* v. *EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979); see 42 U.S.C. 7543(a). That provision prohibits states from regulating emissions from *new* motor vehicles: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." 42 U.S.C. 7543(a).

Section 7543(d), however, expressly saves state and local laws that regulate emissions from motor vehicles that have been sold: "Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." As the Supreme Court has explained, "[b]ecause federal motor vehicle emission control standards apply only to new motor vehicles, States also retain broad residual power over used motor vehicles." *Washington* v. *Gen. Motors Corp.*, 406 U.S. 109, 115 n.4 (1972).

The Act contains multiple other provisions showing that Congress thought carefully about exactly which state laws it wanted to preempt and which laws it wanted to leave unaffected, with a plain tilt against preemption. For instance, Section 7543(e) preempts state and local regulation of certain "new nonroad engines or nonroad vehicles." 42 U.S.C. 7543(e)(1). And Section 7543(c) enacts a limited manufacturer-targeted preemption provision, which covers "any motor vehicle part or motor vehicle engine part" subject to regulation under 42 U.S.C. 7541(a)(2) (addressing certifications by a "manufacturer").

The Act's savings clauses, in turn, make clear that Congress otherwise intended to preserve state and local authority. In addition to 42 U.S.C. 7543(d), Section 7416 instructs that, except as otherwise provided in sections with express preemption provisions, "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." 42 U.S.C. 7416. And 42 U.S.C. 7604(e) reiterates that "States[] and local governments may initiate actions to enforce compliance with federal standards and to enforce other statutory and common-law rights." *Washington*, 406 U.S. at 115 n.4 (citing 42 U.S.C. 1857h-2 (recodified as 42 U.S.C. 7604)).

Tampering. Volkswagen's position hinges on the existence of federal anti-tampering laws. The Act forbids "any person to remove or render inoperative" any part of an emissions-control system, and forbids "any person to manufacture or sell, or offer to sell, or install, any part or component" whose "principal effect . . . is to bypass, defeat, or render inoperative" an emissions-control system. 42 U.S.C. 7522(a)(3)(A), (B).

The Act imposes civil penalties on anyone who violates those prohibitions. For violations of Section 7522(a)(3)(A), a "manufacturer or dealer" faces up to a $25,000 penalty while "[a]ny person other than a manufacturer or dealer" is subject to a penalty up to $2,500. 42 U.S.C 7524(a). For violations of Section 7522(a)(3)(B), "any person" (manufacturer, dealer, or otherwise) is subject to a penalty up to $2,500. *Ibid.*

2. a. We realize that the government is familiar with the conduct giving rise to this case, but it bears repeating that two distinct forms of tampering are at issue. The first is tampering that occurred in the original manufacture of the affected vehicles. This so-called "daily tampering" involved software installed during the manufacturing process that caused the vehicles to start in test mode—*i.e.*, in compliance with emissions standards—but then switch to dirty "road mode" when the software determined the vehicle was not being tested. This letter does not further discuss the Counties' daily tampering claims.

This letter instead focuses on the second form of tampering, which the parties have called "recall tampering." In some cars, Volkswagen's daily tampering software proved ineffective—the car would not switch to road mode, meaning that it was running too clean for the engines that Volkswagen had installed in the vehicles, causing extra wear and tear. C.A. Excerpts of Record ("ER") 49-50. Volkswagen faced significant costs from engines that were wearing out too quickly. *Ibid.* So it devised entirely new software that would cheat emissions tests in a different way: Rather than starting in test mode then switching to road mode, the car would *start* in road mode, then use newly designed detection methods to determine if it was being tested. ER 50-51. Only if the car detected testing would it switch to clean mode. *Ibid.*

Of critical importance here, Volkswagen installed this new recall tampering software on *in-use* vehicles, at *local* dealerships, on a *car-by-car* basis. ER 6, 14. Certainly, Volkswagen wished to install its new software on as many vehicles as possible—and it succeeded in doing so on numerous vehicles in Salt Lake and Hillsborough Counties. But each installation happened individually, when owners brought their cars into dealerships located within the Counties' borders for routine maintenance or in response to a recall notice. ER 14.

It is undisputed that Volkswagen failed to disclose this new post-sale tampering software to the EPA when it went through the EPA's recall and field fix processes. ER 51.

b. The Counties allege that Volkswagen's actions violated their anti-tampering laws.[1] The district court granted Volkswagen's motion to dismiss, finding that the Act impliedly preempts the Counties' claims regarding post-sale tampering. *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Prods. Liability Litig.*, 310 F. Supp. 3d 1030 (N.D. Cal. 2018). The gist of the

[1] The relevant section of the Utah Administrative Code provides:

> Any person owning or operating any motor vehicle or motor vehicle engine registered or principally operated in the State of Utah on which is installed or incorporated a system or device for the control of crankcase emissions or exhaust emissions in compliance with the Federal motor vehicle rules, shall maintain the system or device in operable condition and shall use it at all times that the motor vehicle or motor vehicle engine is operated. No person shall remove or make inoperable the system or device or any part thereof, except for the purpose of installing another system or device, or part thereof, which is equally or more effective in reducing emissions from the vehicle to the atmosphere.

Utah Admin. Code R307-201-4; see ER 8.

Hillsborough invoked two county rules, which provide that "[n]o person shall tamper, cause, or allow the tampering of the emission control system of any motor vehicle," and "[no] person shall manufacture, install, sell or advertise for sale, devices to defeat or render inoperable any component of a motor vehicle's emission control system." EPC Rules 1-8.05(1), (6); see ER 10-11.

court's reasoning was that the Act makes the regulation of manufacturer, model-wide changes the exclusive province of the federal government. As the court put it, whereas a state or local government could bring a tampering claim against a manufacturer who tampered "with a single in-use vehicle during vehicle maintenance," "when a manufacturer's actions affect vehicles model wide, the Clean Air Act manifests Congress' intent that EPA, not the states or local governments, will regulate that conduct." *Id.* at 1043-1044.

B. Obstacle Preemption Requires Textual Evidence Of Preemptive Intent, But The Clean Air Act Is Explicit That Absent Express Preemption, Congress Intended To Preserve State Law

The district court erred in finding preemption here. Conflict preemption occurs where either (1) compliance with both federal and state law is impossible or (2) the state law poses "'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Wyeth* v. *Levine*, 555 U.S. 555, 563-564 (2009). Only obstacle preemption is at issue in this case.

The analysis must "'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest* purpose of Congress.'" *Ibid.* (emphasis added); see *Exxon Mobil Corp* v. *U.S. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000). That purpose must emanate from the text and structure of the Clean Air Act, not a "freewheeling judicial inquiry" into federal objectives. *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment) ("A freewheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that preempts state law."); *Wyeth*, 555 U.S. at 588 (Thomas, J., concurring in the judgment) ("'[P]re-emption analysis is, or at least should be, a matter of precise statutory [or regulatory] construction rather than an exercise in free-form judicial policymaking'") (quoting *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 911 (2000) (Stevens, J., dissenting)).[2]

The district court got the standard for obstacle preemption exactly backwards. Rather than analyze whether the Act shows "the clear and manifest purpose of Congress" to *strip* the Counties of their traditional police power to regulate air pollution, the court asked whether "state and local governments [were] given authority to supplement EPA's enforcement authority." 310 F. Supp. 3d at 1043. Congress does not "give[]" states their police powers. The district court's failure to appreciate this fundamental principle of preemption infected its entire opinion.

Indeed, Congress could not have been clearer that, aside from express preemption, it meant to preserve traditional state and local authority in this arena. For example, in "a sweeping and explicit provision entitled the 'Retention of State Authority'" (*Exxon*, 217 F.3d at 1255), Congress instructed that, except for several express preemption provisions, "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any

[2] It is beyond serious dispute that regulating air pollution lies within the states' historic police powers. See, *e.g.*, *Exxon*, 217 F.3d at 1255 ("Air pollution prevention falls under the broad police powers of the states.").

standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." 42 U.S.C. 7416. If the statutes here constitute standards or requirements "respecting" air pollution—as they must for Volkswagen's express preemption argument to prevail regarding the daily tampering claims—then the statutes must fall squarely within Section 7416's saving purview. Yet the district court did not even cite Section 7416.[3]

As the government knows, EPA has long operated consistent with the understanding that the federal government and states act within the same sphere (assuming the states do not run afoul of express preemption). For example, EPA has affirmatively approved state anti-tampering laws with the same scope as the Counties', and it has disapproved state anti-tampering laws for being less stringent than the federal anti-tampering rule. See Counties' Opening Br. 20 n.54; see, *e.g.* 50 Fed. Reg. 30960, 30961-30962 (July 31, 1985) (approving Indiana law that "prohibits any person . . . . from removing, disconnecting, disabling or allowing to lapse into disrepair any emission control system installed by the manufacturer" and imposes up to a $2,500 penalty); 63 Fed. Reg. 6651, 6652 (Feb. 10, 1998) (disapproving Texas anti-tampering law).

EPA has also issued regulatory guidance advising of concurrent penalties from states for tampering. *E.g.*, 63 Fed. Reg. 6651, 6652 (Feb. 10, 1998); U.S. EPA, EPA 420-F-93-003, *Mechanics: An Important Law That Affects You* 3 (Sept. 1993) (although the CAA imposes fines for tampering, "[m]any states also impose additional fines"); U.S. EPA, *Fact Sheet: Exhaust System Repair Guidelines* 1 (Mar. 13, 1991) ("In addition to federal law, forty-five out of the fifty States also have statutes or regulations which prohibit tampering with the pollution control equipment on motor vehicles.").

And the federal government's settlements with Volkswagen purport not to "limit the rights of third parties, not party to th[e] Consent Decree[s], against [Volkswagen]." Third Partial Consent Decree ¶ 96, *In re Volkswagen*, No. 3:15-md-02672-CRB, Doc. 2758 (N.D. Cal. Jan. 11, 2017).

Put simply, the text, structure, and longstanding agency interpretations of the Act all point in the same direction: unless it expressly said so, Congress did not intend to displace traditional state authority. That understanding must be the starting point for any attempt to plumb the Act for congressional "purposes and objectives" that could be impeded by state and local tampering enforcement against manufacturers.

C. State And County Regulation Of Used-Vehicle Tampering Does Not Pose An Obstacle To Any Objective Of The Clean Air Act

Given the Act's express and broad approval of state environmental regulation and the long history of state anti-tampering enforcement, it should be unsurprising that Volkswagen cannot

[3] Even where Congress appeared to give the Administrator a measure of control over suits filed by non-federal plaintiffs to enforce the Act's standards (see 42 U.S.C 7604(a)-(b)), Congress made explicit that this provision does not preempt state law. See 42 U.S.C. 7604(e); *Washington*, 406 U.S. at 115 n.4 ("local governments may initiate actions to enforce compliance with federal standards and to enforce other statutory and common-law rights"); cf., *e.g.*, *Her Majesty the Queen of the Province of Ontario* v. *City of Detroit*, 874 F.2d 332, 342-343 (6th Cir. 1989) (Section 7604 "clearly indicates that Congress did not wish to abolish state control").

identify any way in which state law poses "'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Wyeth*, 555 U.S. at 563-564. Each of Volkswagen's asserted obstacles is illusory.

First, there is simply no textual basis for Volkswagen's core position—that Congress intended to preempt state anti-tampering laws relating to "manufacturer" or "model-wide" conduct. Such a limitation appears nowhere in the federal anti-tampering rule. And that omission is telling because other provisions of the Act show that Congress knew how to prevent states from regulating manufacturer conduct when it wanted to. Section 7541(h), for example, prohibits states from requiring certain testing by "manufacturer[s] or dealer[s]."[4] And Section 7543(c) imposes preemption relating to certain manufacturer certifications.[5] Congress chose not to include such a provision with respect to anti-tampering—a decision that courts should respect.

Volkswagen nonetheless tries to import a manufacturer exception into the anti-tampering rules by pointing to (1) EPA's useful-life testing of vehicles and (2) the process through which manufacturers obtain EPA's endorsement for post-sale conduct that might otherwise be tampering (*i.e.*, because the conduct might modify an emissions-control system). VW Br. 38-43.

This argument is a red herring for the simple reason that Volkswagen admittedly *evaded* those regimes here. ER 51, 53 (admissions in federal guilty plea). In a mine-run case, where a manufacturer worked with EPA to obtain legitimate approval for a post-sale update, the manufacturer would have strong preemption arguments—a state would obviously impose an obstacle to Congress's objectives by suing a manufacturer for bringing its cars into compliance with the Act. But that's not what happened here. Volkswagen did *not* act in compliance with Congress's statutory regime; it acted completely outside of that process. Volkswagen cannot credibly argue that state law poses an obstacle to a statutory regime that it evaded.

In short, Volkswagen has fabricated from whole cloth the concept of a categorical manufacturer exemption to state anti-tampering rules.

Second, the Act's tampering penalties (42 U.S.C. 7524) do not demonstrate congressional intent to displace state and local anti-tampering rules. This argument not only lacks textual grounding, but would mean that federal law preempts *all* state and local anti-tampering enforcement—whether against a nationwide emissions cheater or a local muffler repair shop.

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[4] Section 7541(h) reads:

> Nothing in section 7543(a) of this title shall be construed to prohibit a State from testing, or requiring testing of, a motor vehicle after the date of sale of such vehicle to the ultimate purchaser (except that no new motor vehicle manufacturer or dealer may be required to conduct testing under this paragraph).

[5] Section 7543(c) reads:

> Whenever a regulation with respect to any motor vehicle part or motor vehicle engine part is in effect under section 7541(a)(2) of this title [relating to manufacturer certifications], no State or political subdivision thereof shall adopt or attempt to enforce any standard or any requirement of certification, inspection, or approval which relates to motor vehicle emissions and is applicable to the same aspect of such part.

The textual point is simple. Section 7524 says nothing at all about displacing concurrent state and local enforcement. It simply sets the boundaries on penalties for *federal* violations. Section 7524 thus offers no independent basis to think that Congress intended to preempt state anti-tampering enforcement against manufacturers (or other multi-state wrongdoers).

Volkswagen's attempt to glean such preemptive intent from Section 7524 would prove too much. Volkswagen says that allowing states and localities to impose concurrent liability for tampering would upset the "congressional calibration of force." VW Br. 47-48. But if that's true for Volkswagen here, then it would be true in *every* case involving conduct within EPA's purview. The federal anti-tampering rule is not limited to new vehicle manufacturers; it applies to "any person." 42 U.S.C. 7522(a)(3). And in practice, EPA enforces anti-tampering rules against non-manufacturers (repair shops, aftermarket-product sellers, trucking companies, etc.) far more often than against manufacturers. *E.g.*, U.S. EPA, 2018 Clean Air Act Enforcement Case Resolutions, www.epa.gov/enforcement/2018-clean-air-act-vehicle-and-engine-enforcement-case-resolutions.

For every case within the Act's ambit, EPA's judgment about the appropriate remedy to seek would represent the proper congressional calibration of force under the Clean Air Act. (So too would EPA's decision *not* to take enforcement action in a given case—EPA would have decided the violation is not serious enough to warrant a penalty.) Accordingly, the unavoidable result of Volkswagen's argument is that federal law would preempt all state and local anti-tampering enforcement against *anyone*. Cf. C.A. Oral Arg. Video 32:25-33:40 (Ikuta, J.) (recognizing this consequence of Volkswagen's argument).

In fact, states and localities would be unable to enforce *any* standard (anti-tampering or otherwise) that EPA also could enforce—EPA will either have penalized the misconduct or decided that pursuing a penalty is unwarranted. Yet Congress explicitly permitted them to enforce such standards absent express preemption. 42 U.S.C. 7416 ("[e]xcept as otherwise provided in [the Act's express preemption provisions]," allowing "any State or political subdivision thereof to adopt or enforce . . . any standard or limitation respecting emissions of air pollutants").

Volkswagen's radical approach to preemption would indeed spawn consequences far beyond the Clean Air Act, leading to preemption of nearly any state statute's application that overlaps with federal enforcement authority. This would upset the very concept of dual sovereignty between the states and the federal government. Cf. *Gamble* v. *United States*, 139 S. Ct. 1960, 1966 (2019) (dual sovereignty "honors the substantive differences between the interests that two sovereigns can have in punishing the same act").

Volkswagen's "calibration of force" argument crumbles under its own weight.

Third, there is no basis for Volkswagen's suggestion that practical concerns—such as facilitating federal settlements with wrongdoers who act on a nationwide scale—can give rise to obstacle preemption. Preemptive intent must be found in the statute. Where the text reveals no such intent, it cannot be manufactured for the convenience of stakeholders in a given case. See *e.g.*, *Omnipoint Commc'ns* v. *City of Huntington Beach*, 738 F.3d 192, 193-194 (9th Cir. 2013)

("Because congressional intent 'is the ultimate touchstone of preemption analysis,' when 'Congress adopts a statute that provides a reliable indication of Congressional intent regarding preemption, the scope of federal preemption is determined by the statute.'") (citation omitted).

To be sure, courts often look to agency interpretations in determining a law's preemptive scope. See, *e.g.*, *ibid*. But they do so because the agency's interpretations offer a clue about the meaning of the statute's text and thus Congress's intent. See *ibid*.; *Wyeth*, 555 U.S. at 565; *Geier* v. *Am. Honda Motor Co., Inc.*, 529 U.S. 861, 875-879 (2000). These cases do not stand for the proposition that agencies (or other interested parties) can create one-off preemption in any given circumstance simply because preemption would be convenient in the context of that case.

Thus, Volkswagen must identify some textual evidence suggesting that Congress intended, for example, to facilitate comprehensive federal settlements by preempting local enforcement against multi-state actors. But nothing like that exists. On the contrary, Congress made clear that absent express preemption, it intended to preserve state and local law. 42 U.S.C. 7416; see also *Washington*, 406 U.S. at 115 n.4; 42 U.S.C. 7604(e). Although that latitude might sometimes make comprehensive settlement with a nationwide wrongdoer more complicated, Congress was clearly willing to pay that price in service of cooperative federalism and clean-air protection.

To the extent that Volkswagen's misconduct violates the laws of multiple jurisdictions, thereby complicating the enforcement process, that is only because its misconduct was so far-reaching. But engaging in especially egregious misconduct is hardly a reason to immunize it. Volkswagen's position here would excuse the worst wrongdoers while maintaining state-law penalties for less pervasive misconduct. It would be perverse, to say the least, to reward companies that create widespread consequences by engaging in large-scale malfeasance.

That same reasoning dispels Volkswagen's argument that allowing concurrent enforcement would expose it to ruinous, duplicative penalties. States and localities can sue Volkswagen only for conduct occurring within their borders. So if Volkswagen faces liability from numerous jurisdictions, that again speaks only to the massive scope of its misconduct. It is not a principled basis for applying preemption.

In any event, Volkswagen's alarmism is unwarranted: it has faced civil penalties of only approximately $2500 per car, a small fraction of its per-car revenue, and less than a tenth of the maximum per-car tampering penalty available under Section 7524. Indeed, Volkswagen faced trillions in total federal liability. Volkswagen offers no reason to think that states and localities would attempt to bankrupt Volkswagen rather than seek measured penalties just as the federal government did. Cf. *United States* v. *Morgan*, 313 U.S. 409, 421 (1941) (courts should presume that public officers are persons "of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances").

This issue, moreover, is a question of the *remedy*, not a question of states' and localities' ability to sue in the first instance. Courts are equipped to temper inappropriately punitive liability

(however remote that possibility may be) through due process and other protections against excessive fines.

The truth of the matter is that the sky has not fallen on Volkswagen, and the prospect of state and local enforcement does not change that.

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Please do not hesitate if you have any questions or additional information would be useful. Otherwise, we look forward to our meeting.

Sincerely,

Peter K. Stris
Douglas D. Geyser
John Stokes

STRIS & MAHER LLP

Counsel for the Counties